

ARTICLES

EAST-WEST LABOR UNION COOPERATION; FALLING WALLS AND OPENING DOORS: COMMUNISM, COLD WAR ERA BARRIERS, AND THE IMMIGRATION ACT OF 1990

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INTRODUCTION

Eastern bloc nations have begun to dismantle exclusively communist-dominated institutions which wed them to the politics and economics of the Soviet Union. The Cold War ceases to rage as Germans re-unite and Czechoslovakia receives the United States' most-favored nation recognition.¹ Within the Soviet Union itself, overtures of Western-style economic reform are being played at an ever urgent pace. Finally, as East and West leaders joined together in Paris in an arms reduction treaty, the President of the United States hailed the event as an official end to the Cold War.²

These rapid political and economic changes bring with them the need for labor reforms and labor union re-organization. The reduction or removal of government control over unions has led workers to search for new trade union and labor-management relations models which will work under new economic and political systems. Some trade unions may retain elements of former communist organization, membership, and strong relationships with political parties including the newly re-constituted Communist Party. Western nations question whether, when, and how these new non-communists will lose the burdens associated with being "former" communist members and leaders. Moreover, Western concerns will focus on how and when re-constituted communist trade unions become Western-style 'free trade unions'. The need for answers to these questions may be eliminated with the establishment of meaningful non-monopolistic, pluralistic unions under non-totalitarian governments in these transitional states. If the United States continues its Cold War policies of excluding former communist members for their "past" associations, ideology, and activities, the establishment of international ties and cooperation with these unions remains uncertain. The Immigration Act of 1990³ provides some hope of lowering United States walls which have excluded foreign communist labor

1. *Trade Pact with Czechs*, N.Y. Times, Nov. 12, 1990, at 4.

2. *Bush Finally Concludes, 'The Cold War Is Over'*, Honolulu Advertiser, Nov. 22, 1990, at B-1. President Bush, having refused for the past year to openly acknowledge that the collapse of communist regimes in Eastern Europe meant an end to the East-West struggle of the post-World War II Cold War is quoted in Paris on November 21, 1990 as saying, "[W]e have closed a chapter of history. The Cold War is over." *Id.* The event was the European Summit at the Conference on Security and Cooperation, where President Bush and other world leaders, including U.S.S.R. President Gorbachev, signed an agreement known as the Charter of Paris. *Id.*

3. Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended at 8 U.S.C. §§ 1101-1525) (1991) [hereinafter Immigration Act of 1990]. While the laws may lift barriers, serious policy barriers may remain in labor union policies. See *No Thanks, Comrade Li*, China Labor Notes (Asian-American Free Labor Institute) No. 10, at 1 (Nov. 1990) (rejecting a proposed China-United States labor union exchange).

unionists from visiting the United States and meeting with American labor unionists.

The changing make-up and roles of labor unions under the Eastern European renaissance raise issues as to whether United States laws and labor union policies unduly inhibit American labor unions from assisting and influencing the restructuring of former Eastern European communist trade unions and labor reforms. This may occur due to America's Cold War anti-communist statutes and labor union regulations which may unnecessarily restrict contact with communist regimes and limit assistance and cooperation between United States' and Eastern Europe's communist and former communist labor unionists.

Inasmuch as America's anti-communist laws may inhibit or provide obstacles for Western influence in the restructuring of these formerly communist countries, this article examines the validity and limits of the legal restraints on contact between communist ideology and United States labor unions; particularly the ability of labor unionists to travel freely and to exchange ideas during this re-building phase of Europe's latest renaissance.

The post-Cold War congressional debate is beginning to focus on the larger issue of whether communist ideology needs to be carefully regulated within the United States. As recently as 1986, critics of American immigration policies found examples of "McCarthyism ignorance" rooted in certain ideological exclusionary provisions of United States legislation.⁴ In January, 1990, Senator Daniel Moynihan, author of an amendment purporting to curtail exclusion based on ideological grounds, stated:

For a generation and more, these miserable provisions made the United States present itself to other nations as a nation of fearful, muddled, intimidated citizens. We were not that; we are not that; and now at least our statutes accord with the facts.⁵

In February, 1990, however, a Canadian newspaper reported that a Canadian labor leader, who had previously visited the United States some fifty times, was denied entry into the United States because of his prior participation in such "subversive activities" as playing baseball

4. Note, *Ideological Exclusions: A Prior Restraint Analysis*, 11 COMM/ENT. 335 (1989) (tracing the continuing criticism of American anti-communist immigration policies from cultural and political commentators).

5. 136 CONG. REC. § 544 (daily ed. Jan. 30, 1990) (statement of Sen. Moynihan). Senator Moynihan's comments refer to a list of factors which had formerly mandated exclusion from the United States. See also 8 U.S.C. § 1182(a)(28)(A)-(G) (1987) (citing specific activities and beliefs which would exclude an individual from entry into the United States).

with a communist youth group in 1936.⁶ Interestingly, this same foreign labor leader had met with President Bush and Polish President Lech Walesa, in the United States only weeks earlier.⁷

Because the Immigration Act of 1990, when applied to deportation and admission issues, continues to statutorily grant to non-immigrant aliens the same constitutional rights possessed by American citizens, the limits of the United States Constitution's authority to regulate communist ideology and activities must be assessed. Moreover, the constitutional and statutory limitations on immigration policies must be analyzed because of the impact these policies have on the erection or destruction of walls to East-West labor union cooperation. The existence or non-existence of these walls may seriously affect the United States' ability to meet its international commitments to the promotion of freedom of movement and exchange of ideas across international borders.

I. EASTERN EUROPEAN RENAISSANCE BRINGS PLURALISM AND REFORMS: POST-COLD WAR NON-TOTALITARIAN GOVERNMENTS AND FREE TRADE UNIONS

A. EASTERN EUROPEAN REFORMS PRESENT OPPORTUNITY FOR UNITED STATES LABOR UNION ASSISTANCE IN NECESSARY LABOR REFORMS

Opportunities for the United States and its domestic labor unions to assist and influence the restructuring of Eastern Europe are at a crucial point in the developing stages of that region's political, economic, and labor reforms. Decisions are being made every day which, when put into force, will form the new management and labor-management operational traditions of these new systems. Many of these decisions could be more meaningful if exchange and input come, not only from United States management, but from American labor unions as well.

Of course, it is likely that Eastern Europe's final transformation to a market-style economy will reflect most profoundly the influences of its national history and the influences of strong neighbors such as former West Germany. It is also true, however, that the United States is giving hundreds of millions of dollars of aid toward Eastern Europe's re-

6. *Canadian Labor Leader Turned Away At Border*, Honolulu Star-Bulletin, Feb. 14, 1990, at A-15.

7. *See id.* (stating that although Senator Moynihan's amendment may in the future be applied to avoid this, the same result is possible under remaining statutory provisions as will be subsequently examined).

construction. It is becoming increasingly clear that in order for the political and economic reforms in Eastern Europe to take that first successful step, from a socialist economy to some form of market economy, these countries will need to develop a workable management system for their economies and domestic enterprises.⁸ This is an important part of economic reform. It is also largely axiomatic that economic reforms, without subsequent or simultaneous labor reforms, run the risk of ensuring their failure and inviting political instability.

The change, from a socialist or centrally planned approach to one which is more free market responsive, will require not only knowledgeable management, but also supportive and cooperative trade unions. Whereas monolithic socialist trade unions were formerly controlled by the government and used to help implement policies, reforms now permit newly emerging pluralistic trade unions to seek equity for their worker members. Many questions need to be addressed. Will Eastern European states return to their pre-World War II approach? Will they adopt current Western European or former West German-style relationships, including work councils, participation in management and similar programs? Will they look to other models; such as, Japan's style of enterprise unionism under which the union plays a dual role of representing the interests of management and the workers, or to the American model of more single purpose unionism primarily representing the interests of the workers? The approach which is best suited to Eastern European needs will, of course, be decided by Eastern Europeans. Will they be provided, however, with assistance from United States labor unions if needed? Although the AFL-CIO has already visited Eastern Europe and the Soviet Union, the possibility exists that American anti-communist laws and policies will restrain that cooperation.

This article addresses the question of whether American laws or policies restrict the lengths to which United States labor unions can go in their assistance to East European labor unions and whether American labor unions can develop exchanges with their Eastern European counterparts who are now leading the development of free trade unions.

8. See generally, Swiecicki & Thelen, *Responding to Changes in Eastern Europe: The SEED Act and Investment in Poland and Hungary*, 69 MICH. B.J. 650 (1990) (discussing how the governments of Poland and Hungary are accommodating foreign investment by lessening foreign ownership restrictions, encouraging joint ventures and by allowing state-owned companies to convert to public companies limited by shares).

B. TOTALITARIAN GOVERNMENTS TOPPLE: REFORMS UNDERWAY

Political scientists have debated whether the former governments in Eastern Europe were technically (totalitarian) regimes.⁹ The United States, however, had no difficulty labeling a communist regime as a totalitarian government, with various legal and policy implications.¹⁰ Today, certain United States policies, and their application on this issue, warrant re-examination. This is particularly true in light of both President Bush's determination that the Cold War is over, and the new political picture forming in Eastern Europe.¹¹ Though political events continue, and full assessment is best left to the research and judgments of political scientists and government officials, some general illustrative observations can be made as to the new governments forming in Eastern Europe and to the conclusion that for the most part, they are no longer totalitarian governments.

The easiest situation to re-examine is that of former East Germany which re-united with former West Germany to create a new Germany without a totalitarian government.¹² Presumably, communists and for-

9. See generally Z. BRZEZINSKI & C. FRIEDRICH, *TOTALITARIAN DICTATORSHIP AND AUTOCRACY* (1956) [hereinafter BRZEZINSKI & FRIEDRICH]. The authors point out that, technically, all totalitarian dictatorships possess six characteristics: (1) an official ideology; (2) a single mass party typically led by one man, the dictator; (3) a system of terroristic police control; (4) near complete monopoly in the hands of the party of all means of effective mass communication; (5) near complete monopoly in the hands of the party of all means of effective armed combat; and, (6) centralized control and direction of the economy through bureaucratic coordination of most entities. *Id.* at 9-10.

10. See 22 U.S.C. § 2691(b) (1988) (prohibiting trade union representatives from totalitarian governments from entering the United States). This exclusion has now been repealed by the Immigration Act of 1990 which contains no explicit exclusion.

11. See BRZEZINSKI & FRIEDRICH, *supra* note 9, at 9-10 (listing the characteristics of totalitarian states which are now largely absent from Eastern European governments). Whereas the formerly "socialist" governments were really "communist" governments, it is interesting to note that the new non-totalitarian governments, with their pluralistic political parties meaningfully participating in governments no longer controlled by the Communist Party, are now truly non-totalitarian "socialist" governments. *Id.* *The Socialists' New Class Struggle: How to Survive Communism's Fall*, N.Y. Times, Oct. 14, 1990, at E-4. Former German Chancellor Willy Brandt, now president of the Socialist International which recently held its conference in the United States for the first time in 100 years, was reported to have explained that even though "socialism" may have had a bad connotation over the years, since their bitter split with the Communists some seventy years Socialists have thought of themselves as a bulwark against communist totalitarianism. *Id.* Brandt believes that, with the fall of communism in Eastern Europe, there may be an opportunity for renewal of socialism and social democracy; that is, a political and economic system falling somewhere between the extremes of centralized and free market economies. *Id.*

12. See, Blau & Rawert, *East Germany: Legal Steps Towards A Market Economy*, 18 INT'L BUS. LAWYER 305 (1990) (discussing generally the future of Western business ventures in Eastern Germany as the law of private business emerges).

merly communist trade union representatives from the former East Germany would not be precluded under American immigration laws which banned trade union representatives from totalitarian governments. East Germans would be free to visit the United States¹³ and form exchanges with American labor representatives who also are free to do so without legal consequence. But, as will be discussed, perhaps the law is not that clear.

Poland has displaced its Communist Party with a Western-style multi-party system. Former Prime Minister Mazowiecki engaged in "western-recognizable political struggles" with his old ally, Lech Walesa, who in political opposition became leader of the new political party, the Centre Party, and eventually became Poland's first popularly elected president.¹⁴ Interestingly, the new Polish parliament still has left communist members and its temporary President during this transition was General Jaruzelski, the very individual who instigated martial law before the political changes.¹⁵ At the same time that the political reforms are being exercised, Poland's economic reforms forge ahead. Reportedly, Poland's radical economic reform, while not being debated extensively by the politicians, is severely affecting the population with production slowing by twenty-five percent and unemployment rising to 500,000 workers.¹⁶ Many are anxiously awaiting trade union response to the effects of the economic reforms.

In Czechoslovakia, the people displaced the Communist Party monopoly in November, 1989 during the so-called "velvet revolution."¹⁷ Since that time the new government, under the leadership of the dominant political party, the Civic Forum, has held national elections to replace former Communist Party-controlled municipal governments with Western-style municipal councils.¹⁸ In addition, the new govern-

13. See 22 U.S.C. § 2691(b) (1988) (repealed 1991) (excluding from entry into the United States for trade unionists from totalitarian governments).

14. *The End is Nigh*, THE ECONOMIST, June 30, 1990 at 49-50. However, as events continued, Prime Minister Tadeusz Mazowiecki resigned and Solidarity returned to supporting Walesa. See *Solidarity's The Word For Walesa's Campaign*, Honolulu Advertiser, Nov. 28, 1990, at D-1 (noting the election of President Walesa); *Walesa Takes Victory In Polish Elections*, Honolulu Advertiser, Dec. 10, 1990, at D-1.

15. See THE ECONOMIST, *supra* note 14, at 50 (finding that Lech Walesa's New Centre Party is reported to have courted the political favor of former communist satellite parties in his recent election bid).

16. Elsner, *U.S. Sees Polish Political Ferment As Good For Democracy*, (NEXIS, Reuter Lib. Rep. File, June 24, 1990). The United States Department of State is reported to be closely watching the economic reforms in Poland since it has received the most Western resources and it is viewed as a test case for the Soviet Union. *Id.*

17. *The Velvet Vote*, THE ECONOMIST, June 2, 1990, at 50.

18. *Czechs Elect Western-style Local Councils*, Honolulu Advertiser, Nov. 25, 1990, at A-18.

ment introduced legislation to expropriate property the Communist Party had unjustly gained.¹⁹ The present strength of the Communist Party is estimated between 300,000-750,000 members in a nation of 15.5 million, and it had about fifteen percent of the national vote in parliamentary elections held in June, 1990 when it won forty-seven seats in Parliament's 300-member body.²⁰ In October, 1990, the Communist Party's First Secretary Mohorita claimed that the old party, still functioning, was changing its name to the Party of Labor and Democratic Socialism and that it would play an opposition role in the new pluralistic system.²¹ Attention is now turning to needed economic reforms.²²

The Soviet Union has also made dramatic changes in its governmental structure. In October, 1990, the Soviet Union's national labor union organization voted to dissolve itself while President Mikhail Gorbachev called for the development of strong, independent unions to replace those party-controlled unions rejected by the workers.²³ The Soviet government appears to have adopted dramatic economic reforms that will move its country's economy to a free market.²⁴ This path toward a

19. *Thousands Rally in Prague to Denounce Communists*, N.Y. Times, Oct. 12, 1990, at A-3.

20. *Id.*

21. *No Lenin, No Marx and Just Maybe, No Communist Party in Prague*, N.Y. Times, Oct. 14, 1990, at A-10. An interesting comparison exists in Italy which has the largest Communist Party membership in the West with 1.4 million members and is the second most popular political party garnering about 24 percent of the vote in popular elections. *Id.* The Italian Communist Party has recently changed its name to the "Democratic Party of the Left." *Italian Communists Remodeling At Last*, N.Y. Times, Oct. 11, 1990, at A-3.

22. *See Wages in Hungary Increasing with Inflation*, 19 BUSINESS EASTERN EUROPE 323 (1990) (citing Hungary as a "renaissance country" finding itself politically free but economically hurting, and looking for solutions, with a wage-spiraling inflation rate of about 25 percent). Even communist hard-liner Albania has recently allowed new non-communist political parties. *Albania To Allow Political Parties*, Honolulu Advertiser, Dec. 12, 1990, A-16. Interestingly, Yugoslavia with its historical ethnic divisions, in their first free elections in fifty years have elected as President, Slobodan Milosevic, of the Socialist Party, formerly the country's Communist Party. *Ex-Communists Win Big In Serbian Republic*, Honolulu Advertiser, Dec. 13, 1990, D-1. Romanians after having their first free elections in many decades have begun to rally against the new government, which is dominated by former Communist Party members. *Romanians Shout For Ouster Of The Government Too*, Honolulu Advertiser, Dec. 17, 1990, D-1.

23. *Official Trade Union Yields to Grass Roots*, Honolulu Advertiser, Oct. 25, 1990, at D-1.

24. *See Reshaping the Soviet Economy; 500 Ways to Shake the World*, THE ECONOMIST, Sept. 15, 1990 at 93-94 (explaining the Shatalin economic proposal; a day-by-day timetable outlining the Soviet professor's plan to transform the Soviet economy into one based on private property and private enterprise); *A Russian Holds Forth on Reform*, N.Y. Times, Oct. 8, 1990, at A-3.

western-style economy and democracy seems fixed since the recent failed coup attempt and the death blow to the Communist party that followed that attempt.

Totalitarian governments are toppling in Eastern Europe. United States laws and policies, based on situations from the Cold War, need to be re-evaluated in light of this demise of the totalitarian form of government. Such revisions are necessary as the East restructures itself, to ensure the availability of full exchanges and assistance between East and West labor and trade unions.

C. COMMUNIST TRADE UNION'S MONOPOLY REPLACED BY PLURALISM AND FREE TRADE UNIONS

Political reforms bring labor reforms that permit pluralism in trade unions. But just as former Communist party managers of a centralized, controlled economy now have little idea how to manage a new market economy, so former Communist party trade unionists may have little or no experience with which to forge their proper role in a new labor-management alliance.

This can result in power vacuums and, at times, 'unholy alliances'. For example, in May, 1990, there was a wage-related railway strike by Polish workers not represented by a union.²⁵ Sporadic sit-down strikes ensued which created a serious effect on railway operations when non-union strikers were immediately supported by an ex-communist trade union leader who sought to lead the strikes.²⁶ Since European trade unions are well-known for their political alignments and involvements, this provides the newly forming non-communist trade unions with the even greater responsibility of using their power wisely to help bring about needed reforms.²⁷

Because Eastern Europe is nearly forty years behind the West in organizing and structuring independent trade unions, there will necessarily be a vacuum of leadership. It is natural to expect former communist trade unions, with the most experience, to continue their involvement in old and new trade unions. Where their old traditions may lead them and their country's reforms, is a very interesting ques-

25. *Yawning Gap*, THE ECONOMIST, June 2, 1990, at 54. Non-communist union leader Lech Walesa thereafter was called in and helped avert the continued strike. *Id.*

26. *Id.*

27. *Angry Romanian Crowds Continue Price Protests*, Honolulu Advertiser, Nov. 3, 1990, at D-1. In Romania, some 2,000 workers of the Alpha trade union joined another 3,000 marchers and rallied in front of its Parliament for political changes providing further evidence that freedoms of trade unions in the East are causing them to emulate their counterparts in the West. *Id.*

tion and an area in which American labor union representatives could best make an impact.

There are already European unions, seeking to expand their representation, which are forming coalition trade unions under the 1992 European Community (EC) structures. These unions look to Eastern Europe for possible members and supporters. The resulting unions most probably would be an outgrowth of the Brussels-based European Trade Union Confederation (ETUC), and the unions would be looking toward 1992 to organize a European Worker's Union likely including some Eastern European countries' workers.²⁸ The new union would also be searching for new models of cooperation between workers and management in the EC and with its industrialized competitors; the United States and Japan.²⁹

Therefore, it is quite predictable there will be not only internal but also foreign competition to restructure and influence Eastern European trade unions. Whether the United States and its trade unions participate in that reformation may well depend on whether American anti-communist laws and labor union policies permit exchanges between East and West labor unionists.

D. REEVALUATING UNITED STATES LAWS AND LABOR UNION POLICIES RESTRICTING LABOR UNION'S INTERNATIONAL ACTIVITIES AND ASSISTANCE TO EASTERN EUROPE

Rebuilding Eastern Europe is a burdensome but lofty task readily undertaken by the peoples of Eastern Europe and the Soviet Union. The excitement and development of political, economic, and labor reforms eventually will move them into a strong regional bloc in the world market. The success of these countries' reforms will be determined by factors such as the influences of nationalism, regionalism, and their eventual relationship with the European Community. Also, success will depend on the foundations and assistance given by future economic competitors, such as the United States.

The political decision as to whether it is in the United States' interest to provide support and financial assistance has already been determined by the aid that is being sent to Eastern Europe.³⁰ The world is watching the political reforms and the emergence of free trade unions. Ratio-

28. *Employment Regulation in a United Europe: A Survey of Expectations in the European Community*, DAILY LAB. REP. NO. 121 (BNA) (June 22, 1990) at S-1.

29. *Id.*

30. *See generally*, 30 *Nations Launch Bank To Aid Eastern Europe; Lending To Promote Switch To Free Market*, Washington Post, April 16, 1991, at D-1 (discussing the amount of aid given to the East from Western nations).

nales for American involvement abound: concerns over a return to nationalism;³¹ concerns over economic amalgamation by neighboring Western states;³² concerns over labor instability or infringement of workers' rights by overly-politicized, communist-dominated, management-dominated trade unions or EC-based international trade unions; and concerns over the need to develop management systems which will work under new economic reforms. These reasons, and others, strongly suggest that it is in the United States' interest to contribute and assist in every way possible to the successful restructuring of Eastern Europe.

With the Cold War over and international obligations, such as the Helsinki Accords, mandating increased exchanges and freedom of movement across borders, the time has come to re-examine American laws and policies which preclude or burden freedom of movement and exchanges between East and West. Where totalitarian governments have been toppled and free trade unions are meaningfully permitted under these new governments, easy access between East and West should be assured. Thus, United States immigration policies and other anti-communist laws, which exclude or inhibit representatives of trade unions from these former totalitarian governments, should be eliminated or updated in their application in a manner consistent with the real dangers of communism in today's world. Trade unionists from Eastern Europe who are, or were, members of a communist trade union or who are, or were, members of the Communist Party would now seem to be of little threat to the United States. Therefore, in the usual case, contact between American and Eastern European trade unionists would present little danger, notwithstanding grounds of national security or foreign policy considerations.

Until June 1, 1991, explicit Cold War legislation in the United States precluded entry by foreign trade unionists from totalitarian

31. See, Lendvai, *Eastern Europe I: Liberalism v. Nationalism*, 46 *WORLD TODAY* 131 (July, 1990) (citing Adam Michnik, Poland's Editor-in-Chief of Solidarity's daily newspaper, *Gazeta Wyborcza*, as stating that proposing 'social democracy or liberalism' as alternatives was fundamentally irrelevant in post-totalitarian Central Europe since "the conflict is not between 'capitalism' and 'socialism' or between 'Right' and 'Left,' but rather between two paths, one democratic, pluralist and tolerant, the other nationalist, centralist and authoritarian").

32. *East Warns The West Of Economic Conflicts*, Honolulu Advertiser, Nov. 21, 1990, at D-1. Without massive aid and assistance, Polish Prime Minister Mazowiecki said, "Our common future may be darkened by the sinister clouds of the resurging conflicts of bygone days." *Id.* Also at this European Summit, leaders of Hungary, Poland, and Czechoslovakia specifically called for the "closest possible links" with the European community and other Western institutions. *Id.*

countries.³³ Presumably, entry is now permitted subject to certain foreign policy and national security limitations.³⁴ Other laws mandate registration by of communists' activities and control much of the information the visitors seek to exchange. Moreover, United States laws and policies permit the enforcement, against American citizens, of internal union regulations which discipline or expel union members and exclude from membership those individuals with inappropriate relationships to communism. If such walls against communism remain standing, they will leave the United States as that country which, as Senator Moynihan warned, "presents itself to other nations as a nation of fearful, muddled, and intimidated citizens."³⁵ A clear statement of national policy should be enunciated so that East and West labor union representatives can more easily cooperate, assist, and promote free trade unionism in a free world.³⁶

II. WALL OF UNITED STATES ANTI-COMMUNIST LAWS AND POLICIES CRACKS UNDER IMMIGRATION ACT OF 1990

A. AMERICAN WALLS AGAINST COMMUNISM

1. *Political and Legislative Restraints*

For over forty years, the term communism has stirred fears in American hearts and minds of a foreign enemy subverting the American way of life. Cold War rhetoric fanned the fires of popular support for laws which reflected a general feeling of xenophobia. Now, as the Cold War ends, communism is no longer viewed by many as a dangerous threat to the United States.³⁷

America's labor unions, occasionally haunted during the Cold War era by communist infiltration, adopted a strong anti-communist position and worked hard to maintain their own political integrity. Moreover, these unions sought to promote free trade unionism around the

33. See *infra* notes 40-140 and accompanying text (analyzing the emergence and ramifications of Cold War legislation).

34. *Id.*

35. 136 CONG. REC. § 544 (daily ed. Jan. 30, 1990) (statement by Sen. Moynihan).

36. See Hines, *Reforms in Eastern Europe Spur Dismantling of United States Trade Barriers*, 203 N.Y.L.J. 1 (1990) (declaring that, to date, Eastern European reforms have mostly spurred trade reforms in the United States rather than reforms in free trade union cooperation).

37. See *With A Whimper, Not A Bang, The 1952 McCarran-Walter Act Is Gone*, Washington Post, Nov. 18, 1990, at C-7 (commenting on the changes in American attitudes towards communism as reflected in United States immigration legislation).

world in countries with and without free trade unions. To ensure the political integrity of the unions, a number of United States laws insulated American labor unions from communist associations by regulating their internal policies.³⁸ In addition, labor union regulations prevented union members and leaders from meeting with foreign, non-free trade union leaders.³⁹

Legislative amendments in 1987 and other attempts to relax tough anti-communist controls in certain limited areas, have met with mixed results when applied to foreign labor leaders. Very often, the laws have expressly maintained prohibitions when applied to foreign communist labor leaders such as those from Eastern bloc countries.⁴⁰ In the late 1980's, proposed compromise amendments to the Immigration Act of 1952 would have allowed American labor leaders "to meet and discuss matters of mutual concern with foreign trade unionists, and to create an incentive for totalitarian states to end their repressive practices that violate the rights of workers who seek to promote independent trade unionism."⁴¹ Unfortunately, these amendments failed to be enacted into law.⁴² Finally, on June 1, 1991, the Immigration Act of 1990 opened the door to aliens who are communist trade union members, unless they are excluded under foreign policy or national security reasons.⁴³

American xenophobia regarding communism and the laws which these fears created emerged with the establishment of the Communist Party of the United States (CPUSA). In addition, in the 1950's, Senator McCarthy generated strong national support for regulating commu-

38. See *infra* notes 114-142 and accompanying text (discussing the AFL-CIO, its constitution and the laws regulating labor organizations).

39. *Id.*

40. 8 U.S.C. § 1182(a)(28)(A)-(G) (1987). In a period preceding the demise of the Berlin Wall, section 28 was used to prevent trade union delegations from Eastern bloc nations from meeting with American labor leaders. See H.R. 4427, 100th Cong., 1st Sess. reprinted in Immigration and Deportation Amendments of 1988, H.R. REP. NO. 100-882, 100th Cong., 2d Sess. 1-120 (1988) [hereinafter H.R. 4427 Compromise Report] (containing amendment proposals to Immigration and Naturalization (McCaran-Walter) Act of 1952, Pub. L. No. 820-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1525 (1988 & Supp. II 1990)) [hereinafter INA] contained in compromise bill H.R. 4427 in Immigration and Deportation Amendments).

41. H.R. 4427 Compromise Report, *supra* note 40, at 30.

42. *Id.*

43. Compare 8 U.S.C. § 1182(28)(C) (1970) (excluding from admission into the United States aliens who are members of the Communist party) with Immigration Act of 1990, 8 U.S.C. § 1182(a)(3)(D)(i) (Supp. 1991) (excluding from admission into the United States immigrants who are members of the Communist Party). The former blanket exclusion of all alien members of the Communist Party has been limited only to exclude immigrant members of the Communist Party. Immigration Act of 1990, 8 U.S.C. § 1182 (Supp. 1991) (providing no general exclusion of all communist aliens).

nism.⁴⁴ The CPUSA began after World War I and had approximately 40,000 known members until driven underground by aggressive government prosecution of Bolsheviks and radicals.⁴⁵ By 1922, fewer than 5,000 supporters remained, but a resurgence came during the Great Depression when the ranks rose to 30,000.⁴⁶ The party found opportunities with labor unions in the early 1930's, was involved in strikes, and soon became the leader of newly formed unions. Moreover, in 1935, the party gained leadership positions in national unions when they were requested to assist the organizational drives of the Committee of Industrial Organizations (CIO) which, twenty years later, became the second half of the AFL-CIO.⁴⁷

Due to the Depression-related resurgence of communism, the federal government began to investigate organizations such as the CPUSA, which could affect the government's policies. In 1934, the House Un-American Activities Committee was formed and began its investigations. The committee, however, found the incumbent liberal administration unresponsive to its proposals.⁴⁸ Fueled by the ills and angers of the Depression, American sentiment eventually accepted the dangers of foreigners and foreign ideologies. In 1938, this popular xenophobia lent support to the formation of another Congressional committee, the Dies Committee, which investigated un-American propaganda.⁴⁹ After some 100 anti-alien proposals had been introduced in Congress, an anti-alien statute which specifically targeted communists was passed, the Foreign Agents Registration Act of 1938 (FARA).⁵⁰ From 1938 through the 1950s, a spate of federal laws emerged as the pressures of the Cold War and the political popularity of protecting against foreign threats manifested themselves in anti-communist legislation.

44. M. BELKNAP, *COLD WAR POLITICAL JUSTICE* (1977).

45. *Id.* at 9-10.

46. *Id.* at 10.

47. *Id.*

48. *Id.* at 16-19. See Note, *The Foreign Registration Act: How Open Should the Marketplace of Ideas Be?*, 53 MO. L. REV. 795, 798 (1988) [hereinafter Note, *The Foreign Registration Act*] (discussing historical background and investigations of the House Un-American Activities Committee and McCarthyism).

49. M. BELKNAP, *COLD WAR POLITICAL JUSTICE* (1977). See Simmons, *The American Civil Liberties Union and the Dies Committee, 1938-1940*, 17 HARV. C.R.-C.L.L. REV. 183 (1982) (providing more specific details of the Dies Committee's activities).

50. 22 U.S.C. §§ 611-621 (1988).

a. Foreign Agents Registration Act of 1938⁵¹

FARA sought to protect the internal security, national defense, and foreign relations of the United States by requiring identification and registration of persons disseminating propaganda and alien ideologies.⁵² In an attempt to counter propaganda sent to the United States by the Axis powers of Germany, Italy and Japan, FARA was amended in 1942.⁵³ The amendments required disclosure statements which deemed the dissemination of alien ideologies as "political propaganda."⁵⁴ Moreover, in 1966, FARA's focus was shifted to regulate lobbyists for foreign principals seeking to influence American foreign and domestic policies without using proper diplomatic channels.⁵⁵

b. Alien Registration Act of 1940⁵⁶

Passed to prohibit conspiracies to overthrow the United States government, the Alien Registration Act also allowed for the prosecution, deportation, or exclusion of persons who believed in, advocated, or were former members of proscribed organizations, such as communists.⁵⁷

c. Internal Security Act of 1950⁵⁸

The Internal Security Act specifically applies to communists and fascists in the United States. Subchapter I, also known as the Subversive Activities Control Act of 1950, sought to combat the world communist movement and prosecute those persons who knowingly and willfully participated in the movement. While membership was not a *per se* violation, it did require communist organizations to register and submit annual reports. In addition, the statute provided for the restriction of communist members' passports.⁵⁹

51. *Id.*

52. Note, *Unconstitutional Inhibitions: "Political Propaganda" and the Foreign Agents Registration Act*, 33 N.Y.L. SCH. L. REV. 345 (1988).

53. Note, *supra* note 48, at 799.

54. *Id.*

55. Note, *supra* note 48, at 352.

56. 18 U.S.C. §§ 2385-2387 (1988).

57. 18 U.S.C. §§ 2385-2387 (1988).

58. 50 U.S.C. § 781 (1988).

59. 50 U.S.C. § 785 (1988). See *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (holding that the passport restriction was later held unconstitutional). This law was also used as the basis for including anti-Communist membership provision in other labor laws; such as, the Civil Rights Law of 1964 which excludes members of Communist Party or Communist-action or Communist-front organizations from coverage. 42 U.S.C. § 2000e-2(f) (1989). See also *Albertson v. Subversive Control Board*, 382 U.S. 70 (1965) (striking down the registration provisions given that admission of party membership could be used for subsequent prosecutions under the Smith Act which violated the privilege against self-incrimination).

d. Immigration and Naturalization Act of 1952⁶⁰

Passed over President Truman's veto,⁶¹ Congress used its plenary power, over the admission and deportation of aliens to protect international relations and defense, to pass the Immigration and Naturalization Act of 1952 which permitted exclusion of aliens "for any reason whatsoever, such as the Government's dislike of the alien's political or social ideas."⁶² The Immigration Act of 1952 provided for the exclusion of certain categories of non-immigrant aliens for security and ideological reasons.⁶³ Section 1182 (a)(27) was quite broad and authorized consular officers or the United States Attorney General to exclude aliens if they believed the person would likely engage in activities prejudicial to the interests of the United States.⁶⁴

Section 1182 (a)(28) authorized exclusion of aliens on the basis of status or affiliation and included "members or affiliates of the Communist Party."⁶⁵ Because section 1182 (a)(28) both allowed the executive to alter Congressional policy towards communism and conflicted with the Helsinki Human Rights Accords,⁶⁶ Congress passed the McGovern Amendment in 1977.⁶⁷ This amendment provided that the Secretary of State recommend to the Attorney General that a waiver be granted to any alien denied entry on the basis of membership or affiliation with a

60. INA, *supra* note 40, at 8 U.S.C. §§ 1101-1503.

61. Comment, *The McCarran-Walter Act and Ideological Exclusion: A Call For Reform*, 43 U. MIAMI L. REV. 1141, 1143 (1989).

62. *Id.* at 1142.

63. INA, *supra* note 40, at 8 U.S.C. §§ 1182(a)(27), (a)(28).

64. INA, *supra* note 40, at 8 U.S.C. § 1182(a)(27). This determination is final and cannot be waived by immigration officials. 8 U.S.C. § 1182(d)(3).

65. INA, *supra* note 40, at 8 U.S.C. § 1182(a)(28)(c). Some exceptions existed for involuntary or renounced membership or affiliation. 8 U.S.C. § 1182(a)(I).

66. See CLASBY, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 470.1 (R. Lillich ed. 1986) [hereinafter CLASBY] (citing *Conference on Security and Cooperation in Europe*, 37 DEPT. STATE BULL. 323 (1975) and examining the role that Congress assumed in excluding non-citizens with ideologies that threatened United States' security). See also, Miranda, *Rethinking the Role of Politics in United States Immigration Law: The Helsinki Accords and Ideological Exclusion of Aliens*, 25 SAN DIEGO L. REV. 301 (1988) [hereinafter Miranda] (analyzing the ideological exclusion of non-citizens from the United States in light of the Helsinki Accords).

67. 22 U.S.C. § 2691 (1989). See also, Comment, *Free Speech and Right of Entry Into the States: Legislation to Remedy the Ideological Exclusion Provisions of the Immigration and Naturalization Act*, 4 AM U.J. INT'L L. & POL'Y 443, 458 (1989) (discussing the McGovern Amendment as a challenge to ideological restrictions on entry into the United States).

proscribed organization unless "admission of such alien would be contrary to the security interests of the United States."⁶⁸

In 1979, the McGovern Amendment's waiver provision was revised in response to labor unionists' concerns. The 1977 exception to the McGovern Amendment had excluded aliens affiliated with proscribed organizations from the Amendment's waiver. The 1979 revision defined these aliens as representatives of purported labor organizations dominated by totalitarian governments notwithstanding the absence of any indication that their admission would be contrary to security interests of the United States.⁶⁹

Senator McGovern accepted the 1979 amendment to accommodate the "obviously distressed spokesmen of the American labor movement."⁷⁰ In addition, Senator Robert Dole stated that waivers, previously granted to communist labor union leaders from the Soviet Union and Eastern Europe, admitted ". . . representatives of the state rather than representatives of workers. By allowing such individuals in, we are conferring trade union legitimacy on organizations that do not observe the rights of workers."⁷¹

Senator Dole argued that the 1979 provision complied with the spirit of the Helsinki Accords.⁷² Senator McGovern reluctantly agreed to the proposed change to accommodate American labor unionists and to avoid risking the deletion of the 1977 provision altogether.⁷³

68. 22 U.S.C. § 2691 (1989); see CLASBY, *supra* note 68, at 1145 (reporting that waivers are normally given; for example, 45,372 waivers granted based on 45,900 applications). See also, *Exclusion and Deportation of Aliens: Hearings on H.R. 1119 Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 59-61 (1987) (stating that the waiver applies only to section 28 exclusions based on memberships or affiliations but not to section 27 exclusions for aliens considered to be dangerous to United States' security).

69. 22 U.S.C. 2691(b) (1989). See H.R. REP. NO. 882, 100th Cong., 2d Sess., at 30-31 (1988) (proclaiming that the 1979 revised McGovern Amendment waiver provision "does not apply to representatives of purported labor organizations in countries where such organizations are in fact instruments of a totalitarian state").

70. 125 CONG. REC. 10,568 (1979). Senators Javits and Dole proposed this amendment as an alternative to an amendment to delete the McGovern Amendment in which Senator Moynihan and nine others joined. *Id.*

71. *Id.* at 10,566.

72. *Id.*

73. See *id.* (disagreeing with Senator Dole, Senator McGovern took the position that the original McGovern Amendment supported the Helsinki principles and demonstrated

. . . that the United States is confident of its own institutions so that we are not fearful of admitting visitors to this country of a different ideology. We are confident enough of our free enterprise system and our political democracy so that we do not insist on the denial of visitors' visas to those who happen to hold a different ideology).

Subsequently, a 1987 bill, which proposed to abolish much of the McGovern Amendment's ideological exclusion section, fueled further political developments.⁷⁴ Conservative opposition resulted in a proposed compromise bill which excluded trade union officers, officials, and employees of states with totalitarian forms of government.⁷⁵ The proposed compromise bill, however, sought to admit otherwise excluded foreign trade unionists after the Secretaries of State and Labor jointly certified that certain labor unions and their representatives do exist independently of their governments and that the individuals in question had the right to travel to and from the United States.⁷⁶

The congressional committee found that section 28 had been used to prevent trade union delegations, primarily from Eastern bloc nations, from meeting with American labor leaders in the United States. While some delegations were allowed entry on the condition that they not conduct formal meetings with American labor officials or make any statements to the press, those admitted were denied fruitful exchanges with labor leaders.⁷⁷ Therefore, the committee proposed an exception to the section 28 exclusion for trade unions from totalitarian states. If the trade union was independent from government and free to travel to the United States, then all trade union officials or representatives from any trade union would be admitted to the United States. The intent of the provision was to stimulate independent trade unionism and encourage totalitarian states to abolish their repressive practices.⁷⁸

This compromise bill to amend the ideological exclusion provision in the Immigration and Naturalization Act of 1952 failed. The ideological exclusion provision, however, was subsequently amended under the For-

74. *Immigration Exclusion and Deportation Amendments of 1988*, H.R. 4427, 100th Cong., 1st Sess., 184 CONG. REC. 34,540 (1987). Proponents of the 1987 bill argued that the bill was "needed not only to enhance the image of the United States in the international arena and to make U.S. policy regarding admission of aliens more consistent with our criticisms of other nations human rights violations, but more importantly to protect the First Amendment association rights of persons in the United States by providing an open forum for debate, and ensuring access to the widest possible variety of foreign citizens and their ideas. H.R. REP. NO. 882, 100th Cong., 2d Sess., at 16 (1988).

75. H.R. REP. NO. 882, 100th Cong., 2d Sess., at 30 (1988).

76. *Id.*

77. *Id.*

78. *Id.* Prior to Poland's present freedoms, this bill would have provided for the following scenario: if Poland's Solidarity trade union leaders could meet with American labor leaders in the United States and return to Poland, then Poland's communist-dominated official union could also come meet with American labor leaders in the United States. *Id.* at 31.

eign Relations Authorization Act of 1988 (FRAA).⁷⁹ FRAA's section 901, retained the labor organization exclusion but prohibited the exclusion or deportation of aliens "because of any past, current, or expected beliefs, statements, or associations which if engaged in by a United States citizen in the United States, would be protected under the Constitution of the United States."⁸⁰

FRAA limited the executive's power to exclude aliens on the basis of their beliefs and removed cumbersome waiver procedures.⁸¹ There remained, however, authority to deny admission to aliens on the grounds of national security and foreign policy.⁸² Indeed, FRAA's Conference Report⁸³ specifically indicated that the law's scope was limited only to ideological exclusions.⁸⁴

The Immigration Act of 1990⁸⁵ was passed to partially repeal FRAA's section 901 and the McGovern Amendment, thereby removing membership in or affiliation with the Communist Party as a ground for exclusion of non-immigrants.⁸⁶ Former exclusionary sections 27 and 28

79. Foreign Relations Authorization Act, Pub. L. No. 100-204, 101 Stat. 1331 (codified as amended at 8 U.S.C. § 1182 (1988)).

80. *Id.* FRAA was amended the following year to limit its application to non-immigrants only. See 134 CONG. REC. 13,800 (daily ed. Sept. 30, 1988) (amending FRAA to afford greater protection of individuals' political affiliations and ideological considerations); see also H.R. 3792, 101st Cong., 2d Sess., 136 CONG. REC. S. 544 (1990) (stating that the original sunset provision terminating FRAA's amendment in 1989 was repealed so that Section 901 became permanent as of January, 1991).

81. See *supra* notes 79-80 and accompanying text (outlining the specific provisions of FRAA and their distinctions between foreign trade unionists and aliens in general).

82. See 8 U.S.C. § 1182 (1988) (stating that past, current, or expected beliefs, statements, or associations which, if engaged in by an American citizen, would be protected by the United States Constitution were not grounds for exclusion). Aliens who were trade union representatives from ideologically unacceptable totalitarian governments were still excludable. *Id.*

83. H.R. REP. NO. 475, 100th Cong., 1st Sess. at 163-65 (1987). The McCarran-Walter Act's exclusionary provisions remained in place; specifically, subsection 901 (b) (3) which read:

[N]othing in this section shall be construed as affecting the existing authority of the executive branch to deport, to deny issuance of a visa to, or to deny admissions to the United States of any alien . . . who seeks to enter in an official capacity as a representative of a purported labor organization in a country where such organizations are in fact instruments of a totalitarian state. *Id.*

84. Pub. L. No. 100-204, Title IX, § 901, Dec. 22, 1987, 101 Stat. 1399, as amended by Pub. L. 100-461, Title V, § 555, Oct. 1, 1988, 102 Stat. 2268-36, as amending 8 U.S.C.A. § 1182, subsection (b)(3) at 143 (West Supp. 1990).

85. Immigration Act of 1990, *supra* note 3.

86. H.R. REP. NO. 101-955, 101st Cong., 2d Sess. 1-136, at 130 (1990) [hereinafter Conference Report 1990] (distinguishing, however, any "nonimmigrant who is a spy or terrorist, or who seeks the overthrow of the U.S., would remain excludable under other provisions in this legislation"); see also, *Exclusion and Deportation of Aliens: Hearings on H.R. 1119 Before the Subcomm. on Immigration, Refugees, and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. § 212

of the Immigration Act of 1952 are replaced by a new foreign policy exclusion which is intended to establish one clear standard⁸⁷ for exclusions. Moreover, the law provides that

aliens who would previously have been excludable under section 212(a)(28) due to membership or affiliation with the Communist party, but who are no longer excludable for that reason because of the changes made in this provision, would not be excludable under the new foreign policy grounds established by this legislation merely because of such membership or affiliation.⁸⁸

The foreign policy provision excludes an "alien whose entry or proposed activities give the Secretary of State a reasonable ground to believe would have potentially adverse foreign policy consequences for the United States."⁸⁹ The exclusion, however, cannot be based on the alien's former or current political ideology or association, unless the Secretary of State concludes that the alien's admission would jeopardize foreign policy.⁹⁰

Thus, the Immigration Act of 1990 incorporates the earlier requirement of the foreign policy exception that non-immigrant aliens be provided the same constitutional protection as American citizens. Furthermore, the Act eliminates the explicit prohibition on representatives of trade unions from totalitarian governments. The result is that, absent future affirmative governmental restrictions, present and former communist labor representatives or members from communist and non-communist governments will not be excluded from entering the United States and meeting with American labor leaders.

Senator Moynihan, in testimony on the new immigration law, lamented the removal of FRAA's section 901 and the new law's broadened "authority of the President to exclude aliens on the basis of their beliefs" and claimed "[i]t is both ironic and profoundly disappointing that the conferees would choose to revive this McCarthy-era relic in the very year that the cold war came to an end."⁹¹ It is unlikely, however, that interpretations of the new law will resemble the Cold War

(a)(3)(A) (1987) (stating that national security is a basis for excluding those whose entry provides reasonable grounds to believe the alien will enter to engage in proscribed activities).

87. H.R. REP. NO. 101-955, *supra* note 86, at 128.

88. H.R. REP. NO. 101-955, *supra* note 86, at 131.

89. Immigration Act of 1990, *supra* note 3, at 8 U.S.C. § 1182(2)(c).

90. See Immigration Act of 1990, *supra* note 3 at § 1182 (a)(2)(C)(ii-iii) (articulating exceptions for foreign government officials or candidates, and for other aliens, who cannot be excluded because of beliefs, statements, or associations, if lawful in the United States).

91. 136 CONG. REC. S17,15 (daily ed. Oct. 26, 1990) (statement by Sen. Moynihan).

treatment of the McGovern Amendment, which permitted the executive to utilize various sections of the Immigration Act of 1952 to exclude communist trade unionists from Western countries.⁹² Senator Moynihan disagrees with this prediction and warns that the revised immigration law's permissive stance toward policies aimed at the exclusion of aliens for their beliefs will keep Americans under the powerful grip of the Cold War mentality.⁹³

e. Communist Control Act of 1954⁹⁴

The Communist Control Act was passed "to outlaw the Communist Party, to prohibit members of the Communist organizations from serving in certain representative capacities, and for other purposes."⁹⁵ This broad means of controlling the Communist Party was codified as a subchapter to the Internal Security Act of 1950⁹⁶ but was nevertheless, considered a separate measure.⁹⁷

Among the Communist Control Act's provisions are several which specifically relate to labor unions.⁹⁸ The Act amended the Subversive Activities Control Act of 1950 by adding prohibitions on communists holding office or employment with a labor union or representing an employer.⁹⁹ As to communist-infiltrated organizations, the law provided that any labor organization

which is an affiliate in good standing with a national federation or other labor organization whose policies and activities have been directed to opposing Communist organizations, any Communist foreign government, or the Communist

92. See *Abourezk v. Reagan*, 785 F.2d 1043, 1057 (D.C. Cir. 1986), *aff'd*, 484 U.S. 1 (1987) (holding that the Executive cannot use foreign policy grounds to evade the limitations of the McGovern Amendment); see also, *Allende v. Schultz*, 605 F. Supp. 1220, 1225 (D. Mass. 1985), *aff'd*, 845 F.2d 1111 (1st Cir. 1988) (finding that entry cannot be denied to an alien solely based on membership in a proscribed organization). This issue, however, could arise again because the new law may still permit the Executive to exclude former communist trade union leaders as security risks.

93. 136 CONG. REC. S1,715 (daily ed. Oct. 26, 1990) (statement by Sen. Moynihan). Senator Moynihan stated, in pertinent part, "[t]he cold war has insinuated itself throughout our institutions. It has champions in both the Congress and the administration. Several generations of Americans have known nothing else. It will take years of sustained effort to exorcise the cold war from American life." *Id.*

94. 50 U.S.C. §§ 782, 841 (1988).

95. 50 U.S.C. §§ 782, 841 (1988).

96. 50 U.S.C. §§ 776, 777 (1988).

97. See 50 U.S.C. § 841 (1988) (stating that the Communist Control Act was created separately from the Internal Security Act of 1950).

98. See Pub. L. No. 638, ch. 886, 68 Stat. 775, §§ 6,7,10 (1954) (listing sections of the Communist Control Act which directly address labor organizations).

99. Pub. L. No. 638, ch. 886, 68 Stat. 777, § 6 (1954) *amending* 50 U.S.C. § 784(E) (1950).

movement, shall be presumed prima facie not to be a 'Communist-infiltrated organization.'¹⁰⁰

Furthermore, section 10 of the Communist Control Act added section 13A(g) to the Internal Security Act of 1950 which stated that any labor organization labeled, under the latter Act, as a communist-action organization, a communist-front organization, or a communist-infiltrated organization should have its names published in the Federal Register and a copy sent to the National Labor Relations Board.¹⁰¹ The Act further stated: that these Communist-designated labor organizations, thereafter, would be ineligible to act as a representative of employees under the National Labor Relations Act of 1947 (NLRA); that such organizations no longer had rights under the Act;¹⁰² and, that employees and employers had the power to "rescind any authority previously granted" to such organizations.¹⁰³

f. Labor-Management Reporting and Disclosure Act of 1959¹⁰⁴

The Labor-Management Reporting and Disclosure Act (LMRDA) was not primarily enacted nor intended as an anti-communist measure, however it did initially provide a ban on communist members' involvement with labor unions.¹⁰⁵ Additionally, LMRDA gave unions a certain autonomy in regulating members from participating in activities which would interfere with the unions' performance of legal and contractual obligations.¹⁰⁶ LMRDA contained a bill of rights, providing union members with liberties and privileges similar to those guaranteed under the United States Constitution, including freedom of association and expression.¹⁰⁷ Ongoing litigation continues to test the limits of a union's exclusion or expulsion of persons who have communist affiliations.

100. Pub. L. No. 637, ch. 886, 68 Stat. 775, 777, § 7 (1954) *amending* 50 U.S.C. § 782 (1950).

101. Pub. L. No. 638, ch. 886, 68 Stat. 775, 779 *amending* 50 U.S.C. § 792 (omitted June 30, 1973).

102. Pub. L. No. 638, ch. 886, 68 Stat. 775, 779-780, subsection (h) *amending* 50 U.S.C. § 792 (omitted June 30, 1973).

103. Pub. L. No. 638, ch. 886, 68 Stat. 775, 780, subsection (i) *amending* 50 U.S.C. § 792 (omitted June 30, 1973).

104. 29 U.S.C. §§ 401-531 (1989).

105. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, § 504(a), 73 Stat. 519, 537-538 (1959).

106. 29 U.S.C. § 411(a)(2) (1985).

107. 29 U.S.C. §§ 411-415 (1985); *see also*, Sautman, *The Politicized Worker Under the Labor-Management Reporting and Disclosure Act*, 5 HOFSTRA LAB. L.J. 149, 149-161 (1988) [hereinafter Sautman] (discussing rights accorded union members under the Act and union efforts to exclude communists).

While LMRDA did repeal section 9(h) of the NLRA, which had required union officers to sign oaths denying membership in the Communist Party,¹⁰⁸ LMRDA replaced it with section 504(a) which prohibited certain persons, including felons and past or present members of the Communist Party, from being an officer, employee, adviser, or consultant of a labor union in order to minimize the danger of political strikes.¹⁰⁹ In 1965, however, the Supreme Court invalidated section 504 by deeming it to be a bill of attainder and, therefore, unconstitutional.¹¹⁰ Thereafter, LMRDA's involvement, with respect to the communists, was limited to determining which unions were not permitting their members to enjoy the rights provided under LMRDA, including those unions that expelled or excluded persons based on communist beliefs and affiliations.

2. *American Labor Unions' Historical Experience With Communism*

a. Within the United States

In the United States, the labor movement is historically associated with the development of the American Federation of Labor (AFL) and the Congress of Industrial Organizations (CIO). Despite their divergent policies and practices prior to their 1955 merger, the two unions shared similar experiences in their involvement with, and rejection of communism.

The AFL, created in 1886 by some twenty-five labor unions representing craft-trade workers, set out to promote legislation favorable to

108. Pub. L. No. 86-257, § 201(d), 73 Stat. 525 (1959) (codified as amended by 29 U.S.C. § 9(h)); see Yates, *Labor Solidarity and the Law*, 40 LAB. L.J. 58, 61 (1989) [hereinafter Yates] (stating that under this provision, unions that failed to have their officers sign such an oath were denied protection from the Act and NLRB protection); see also, *American Communications Assn. v. Douds*, 339 U.S. 382, 385-415 (1950) (upholding section 9(h) as a constitutional exercise of Congress' authority to regulate interstate commerce).

109. 29 U.S.C.A. § 504(a) (1989) which states in pertinent part:

No person who is or has been a member of the Communist Party . . . shall serve . . . as an officer, director, trustee, member of any executive board, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . during or for five years after the termination of his membership in the Communist Party.

110. *United States v. Brown*, 381 U.S. 437 (1965). The Court reasoned that by including the phrase, "members of the Communist Party" in § 504, Congress had exceeded its authority to regulate interstate commerce and had created a bill of attainder. *Id.* at 438-56. See U.S. CONST. art. I, § 9, cl. 3 (stating that no bill of attainder or ex post facto law may be passed by Congress).

workers and to assist constituent groups in organizing efforts.¹¹¹ By 1920, the AFL had gained some four million members.¹¹² Reflecting the economic developments of the 1930s and the need for government support to gain war-time labor peace, unions continued to grow. This expansion continued in the 1940s, especially after the enactment of the pro-union National Labor Relations Act, a product of the New Deal era.

The Committee for Industrial Organization was formed in 1935 to organize and represent workers in mass production and other industries.¹¹³ It was comprised of a federation of unions which quickly challenged the AFL, thereby creating a rivalry that continued until 1955 when the two unions merged into the AFL-CIO.¹¹⁴

The Communist Party U.S.A.(CPUSA) played an instrumental role in the American labor movement by promoting the communist belief that a revolution needs the support of the working class. Thus, the CPUSA sought to infiltrate trade unions in hopes of achieving its ultimate goal.¹¹⁵ Though largely rebuffed in the 1920s,¹¹⁶ the CPUSA made some inroads into the coal mining and needle trades¹¹⁷ and, by the 1930s, was urging its supporters to become union members.¹¹⁸ The newly forming CIO was more vulnerable to communist penetration and its membership and leadership reportedly soon became significantly enmeshed with communist supporters.¹¹⁹ Between 1948 and 1950, however, the CIO began to aggressively fight communist infiltration and in 1950, under a 1949 charter, it expelled nine member unions who remained communist dominated.¹²⁰

111. See A. GOLDBERG, *AFL-CIO: LABOR UNITED* 22-26 (1956) [hereinafter GOLDBERG] (describing the early years of the AFL).

112. *Id.* at 23; see, Heldman, *Unions, Politics, and Public Policy: A (Somewhat) Revisionist Approach*, 13 HARV. J.L. & PUB. POL'Y 517, 526-547 (1990) (discussing the growth and merger of the AFL and CIO).

113. GOLDBERG, *supra* note 111, at 36-39.

114. *Id.* at 42-43, 94-95.

115. See I. Howe & L. Coser, *THE AMERICAN COMMUNIST PARTY: A CRITICAL HISTORY (1919-1957)* (1957) [hereinafter AMERICAN COMMUNIST PARTY] (studying the emergence of the Communist Party in the United States).

116. See N. GLAZER, *THE SOCIAL BASIS OF AMERICAN COMMUNISM* 38-88 (1961) [hereinafter GLAZER] (describing how the declining role of the Communist Party in the United States was largely attributable to the dominance of foreign-speaking workers at its helm).

117. *Id.* at 105.

118. M. BELKNAP, *COLD WAR POLITICAL JUSTICE* 10-11 (1977). See GLAZER, *supra* note 116, at 101-10 (1961) (discussing the increasingly larger number of American communists who joined the industrial work force and trade unions).

119. AMERICAN COMMUNIST PARTY, *supra* note 115, at 373-77 (1957).

120. See D. SHANNON, *THE DECLINE OF AMERICAN COMMUNISM* 101-06 (1959) (depicting the Party's gradual expulsion from the CIO's unions).

These developments paralleled the legal developments which for example, in 1947, required union officials to sign an anti-communist oath.¹²¹ Many legal proscriptions came in the 1950's including LMRDA's ban on union officers and employees becoming party members. This contributed to American unions adopting internal regulations, including constitutional bars to union membership by members of the Communist Party.¹²²

When the AFL-CIO formed in 1955, its constitution set out the union's position on communism. The constitution pledges to combat communist and anti-democratic influences,¹²³ prohibits affiliation with any organization allied with the Communist Party,¹²⁴ and authorizes the supervision of any union-affiliate found to advance the cause of totalitarian, fascist or communist entities.¹²⁵ Thereafter, American labor unions, spurred by tough anti-communist laws, took strong anti-communist positions and persistently enforced rules against involvement with communists.¹²⁶

b. Dealings with Foreign Unions

The AFL-CIO's involvement with labor movements of foreign countries can be characterized as a dual approach, distinguishing between 'free' trade unions and others. On one hand, its constitution calls for the promotion of peace, freedom and the advancement of democratic labor movements world-wide.¹²⁷ On the other hand, the AFL-CIO is mandated to protect the labor movement from the communist influences opposed to democracy.¹²⁸

The self-selected duties of the AFL-CIO include representation of the American labor movement in international affairs through its participation in the international labor organizations of democratic na-

121. Labor-Management Relations Act of 1947, ch. 120, 61 Stat. 136, 146, § 9(h) (1947), *repealed by* Labor-Management Reporting and Discharge Act of 1959, 73 Stat. 519, 525, § 201(d) (1959).

122. See Sautman, *supra* note 107, at 152 n. 10 (providing a collection of union constitutional provisions, including those from: The International Brotherhood of Locomotive Engineers, The United Painters Union, Laborer's International of North America, United Mine Workers and others).

123. See GOLDBERG, *supra* note 111, at 35 (citing the AFL-CIO constitution).

124. *Id.* at AFL-CIO CONST. art. III, § 9.

125. *Id.* at AFL-CIO CONST. art. VIII, § 7.

126. See Sautman, *supra* note 107, at 137 (discussing actions brought under the LMRDA by persons denied or expelled from union membership because of alleged communist association or affiliation).

127. GOLDBERG, *supra* note 111, at AFL-CIO CONST. art. II, § 7.

128. *Id.*

tions.¹²⁹ Reportedly, the AFL-CIO has occasionally cooperated with United States intelligence agencies to establish free trade union organizations in totalitarian countries and to fight anti-democratic government policies which undermine the rights of free trade union members.¹³⁰ The AFL-CIO's Department of International Affairs maintains contact with the Department of State, promotes conferences, produces publications, and otherwise involves itself in promoting the labor movement internationally.¹³¹

The AFL-CIO is involved with the International Confederation of Free Trade Unions (ICFTU), whose purpose is to unite world-wide the workers of free democratic trade unions.¹³² The ICFTU is comprised mainly of Western national trade confederations, with European affiliates, including some non-communist socialist members in Western Europe and the Third World.¹³³ By 1986, the ICFTU encompassed 149 affiliates in 100 countries with a total membership of approximately eighty-three million workers.¹³⁴ The AFL-CIO disaffiliated with the ICFTU from 1969 until 1981, due to a disagreement with certain policies of the ICFTU.¹³⁵ Upon its reaffiliation in 1981, the AFL-CIO refused to make any voluntary contributions to the organization's International Solidarity Fund, as to retain strict control over the foreign aid programs in which it participated.¹³⁶

129. AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL RELATIONS, THIS IS THE AFL-CIO 2-3 (1990) [hereinafter THIS IS THE AFL-CIO].

130. See Cox, *Labor and Hegemony: A Reply*, 34 INT'L ORG. 159, 167-76 (1980) (discussing CIA funding of international labor movements); see also, FOREIGN AND MILITARY INTELLIGENCE: FINAL REPORT OF THE SELECT COMMITTEE TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, BOOK I. S. REP. No. 755, 94th Cong., 2d Sess. 145-49, 445-46 (1976) (referring to CIA support of labor organizations opposed to communism).

131. THIS IS THE AFL-CIO, *supra* note 129, at 12.

132. Windmuller, *The International Confederation of Free Trade Unions*, in INT'L ENCYCLOPEDIA FOR LABOUR LAW AND INDUSTRIAL RELATIONS 61 (R. Blaupain ed. 1986) [hereinafter THE INTERNATIONAL CONFEDERATION OF FREE TRADE UNIONS]. Other avowed aims of the ICFTU include undertaking and defending the "defense of the free trade unions against any campaign aiming at that destruction or at the reconstruction of their rights or at the infiltration and subjugation of labour organizations by totalitarian or other anti-labour forces." *Id.* at 73. A further aim encourages ". . . the development of the resources of all countries in order to further the economic, social and cultural progress of the peoples of the world. . . ." *Id.* at 74. Specifically, the ICFTU's constitution states, as its purpose, "to unite the workers organized in the free and democratic trade unions of the world." *Id.* Windmuller notes, however, that "this principle must be regarded as an ideal rather than as a strict requirement." *Id.*

133. *Id.* at 61.

134. *Id.* at 62.

135. *Id.*

136. *Id.* at 69-70.

Historically, the chief rival of the ICFTU and AFL-CIO has been the World Federation of Trade Unions (WFTU) whose membership includes national labor federations of communist countries. In 1982, the WFTU claimed membership of approximately 206 million workers, with two-thirds of its membership allocated to the Soviet Union's labor federation.¹³⁷ It has had union affiliates from Western countries including France and Italy¹³⁸ and maintains a relationship with the International Labor Organization.¹³⁹

The relationship between the ICFTU and the WFTU, while normally competitive, had a period of detente in the early 1970's which led to four East-West trade union conferences.¹⁴⁰ Labor members, were not precluded from belonging to more than one organization.¹⁴¹ For example, although the WFTU claimed membership of Poland's trade union confederation, in 1983 the ICFTU also claimed affiliation with Poland's five million Solidarity members.¹⁴² The AFL-CIO, while retaining much of its autonomy, has nevertheless bound itself to international labor cooperation through its affiliation with the ICFTU. Today, with the majority of Eastern European trade federations venturing outside the WFTU and the demise of communism's predominance over the trade unions of communist regimes, it is predictable that the AFL-CIO and the ICFTU's assistance in Eastern Europe will increase.

Much of the challenge to the labor movement in the future lies in further dealings with the foreign trade unions.¹⁴³ In foreign dealings with communism, American labor unions, in particular the AFL-CIO, have worked in foreign countries promoting free trade unions and have assisted the formation of these trade unions in developing countries. At the same time, the AFL-CIO has taken a strong anti-communist position based upon communism's threat to the rights and freedoms of democratic trade unions, and the Soviet Union's challenge to the secur-

137. *Id.* at 105-06. Although there have been periods when WFTU affiliates showed some independence from Soviet domination; for example, in 1969, when the Soviets invaded Czechoslovakia, leaders of non-supporting affiliates were quickly replaced by those loyal to the WFTU. *Id.*

138. *Id.* at 94.

139. *Id.* at 102.

140. *See id.* at 111 (citing the British Trades Union Congress (TUC) as the most responsive Western labor organization to the WFTU's overtures for a closer relationship during the 1970's).

141. *Id.* at 90.

142. *Id.*

143. *See* Donahue, *The Role and Challenges Facing Unions in the 1940's and the 1980's — A Comparison*, 52 *FORDHAM L. REV.* 1062, 1069 (1984) (stating that "the increasing internationalization of financing and finances. . . will surely require coordination in a variety of ways across national borders, probably through the strengthening of the International Trade Secretariats for bargaining and joint actions").

ity of the United States and its workers.¹⁴⁴ In more recent years, the AFL-CIO has sent delegations to Eastern Europe and the Soviet Union.¹⁴⁵ With the removal of Cold War barriers, the political renaissance of Eastern Europe, as well as the history of the AFL-CIO in assisting free trade union movements, one can reasonably presume the continued exchange of labor union representatives with the United States.

B. IMPACT OF PRESENT LAW AND POLICY ON RIGHTS OF LABOR UNIONS AND MEMBERS

1. *Rights of American Citizens*

a. Constitutional Rights

A number of early anti-communist laws tested the general constitutionality of the American government's outlawing an individual's involvement with the Communist Party. The leading case of *Yates v. United States*¹⁴⁶ reversed the convictions of fourteen Communist Party officials under the Alien Registration Act. The Court distinguished between discussions, which receive first amendment protection, and actions involving the overthrow of the government.¹⁴⁷ In *United States v. Noto*,¹⁴⁸ the Court held that under the Alien Registration Act, any organization which advocates the overthrow of the United States by force or violence may be criminally prosecuted.¹⁴⁹ Furthermore, in *Scales v. United States*,¹⁵⁰ the Supreme Court reaffirmed their belief that mere membership in the Communist Party did not violate the Alien Regis-

144. See Douglas and Godson, *Labor and Hegemony: A Critique*, 34 INT'L ORGANIZATION 149, 154 (1980) (voting that "[t]he AFL-CIO states that its anti-communism is based upon the denial of trade-union rights and democratic freedoms to workers wherever communism has come to power, and upon the threat that the Soviet Union and the world's communist parties aligned with it pose to the world balance of power and thus to the security of the United States and its workers").

145. AFL-CIO News, Dec. 11, 1989 at 1.

146. 354 U.S. 298 (1957). See Note, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889 (1985) (citing *Yates v. United States* as lending support to the modern doctrine that punishing the espousal of philosophical beliefs violates the first amendment).

147. *Id.* at 324.

148. 367 U.S. 290 (1961).

149. *Id.* at 291.

150. 367 U.S. 203 (1961) (providing that membership in a Communist organization did not *per se* violate nor *pro tanto* repeal the membership clause of the Alien Registration Act but, rather, modified the Act so that an illegal party purpose and a member's knowledge of such purpose must be shown). *Id.* at 206-19; see *Noto v. United States*, 367 U.S. 290, 294-300 (1961) (discussing the Alien Registration Act).

tration Act.¹⁵¹ Nevertheless, active membership in an organization engaged in illegal advocacy is sufficient to sustain a conviction.¹⁵² The Court reinforced the *Scale's* decision in *Communist Party v. Whitcomb*,¹⁵³ holding that although the government may not proscribe the advocacy of abstract doctrine, it can outlaw the advocacy of action derived from that doctrine.¹⁵⁴

Subsequently in 1964, the Supreme Court held in *Aptheker v. Secretary of State*,¹⁵⁵ that the portion of the Subversive Activities Control Act of 1950 which restricted the use of passports by members of the Communist Party was unconstitutional. The Act's irrebuttable presumption, that all members engaged in activities which would endanger national security, was held to improperly transgress the liberty interest in the right to travel by forcing a choice between travel and membership in an association.¹⁵⁶ Consequently, although judicial interpretations of the Constitution hold that *per se* membership in the Communist Party may be an insufficient basis for prosecution, membership may still provide the basis for prosecution where illegal advocacy or a sufficient degree of activity and involvement in that advocacy is shown.

American labor unionists also have had specific restrictions placed on their involvement with communism. Section 504(a) of the LMRDA explicitly prohibited union officials or employees from being members of the Communist Party.¹⁵⁷ Though its predecessor, section 9(h) of the NLRA had been upheld,¹⁵⁸ in *United States v. Brown*, the Supreme Court declared that section 504(a)'s prohibition on the basis of Communist Party membership was unconstitutional.¹⁵⁹ The Court based its decision on the Constitution's Bill of Attainder Clause which guards against legislative interference with the exercise of judicial powers.¹⁶⁰ Thus, Congress overreached its legislative authority under the inter-

151. *Id.* at 207.

152. 367 U.S. 203, 206-19 (1961).

153. 414 U.S. 441, 447-50 (1974).

154. *Id.* at 448.

155. 378 U.S. 500 (1964).

156. *Id.* at 509-11. *But see*, *Zemel v. Rusk*, 381 U.S. 1, 16 (1965) (upholding the government's right to restrict travel to Communist Cuba, as part of a foreign policy rather than forcing a choice between travel and membership in an association). Moreover, national security interests may restrict travel. *Id.* *See also*, *Haig v. Agee*, 453 U.S. 280 (1981) (discussing the Central Intelligence Agency's interest in protecting intelligence apparatus).

157. 29 U.S.C. § 504(a) (1988).

158. *American Communications Assn. v. Douds*, 339 U.S. 382 (1950).

159. 381 U.S. 437 (1965).

160. *Id.*

state commerce clause when it designated members of the Communist Party as individuals likely to incite political strikes.¹⁶¹

b. Rights Under Labor Unions' Internal Regulations

Limitations are placed on members and affiliated unions' involvement with the Communist Party. This often raises issues under title I of LMRDA as to whether the regulations are properly within the unions' authority or are impermissible under the members' bill of rights as they would be under the United States Constitution's bill of rights.¹⁶² The statute reads:

Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; . . . *Provided*, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.¹⁶³

Unions' internal response to anti-communist laws is to place anti-communist and anti-fascist provisions in their union constitutions and by-laws. First, national unions may exclude from membership, individuals from unions affiliated with communism. Secondly, the unions often exclude from membership, individuals believing, supporting, or being a member of certain political organizations.

Sometimes the provisions are direct, and aimed at the union leadership.¹⁶⁴ Unions also attack communism by rendering ineligible for membership those who are a "member of a subversive group which shall advocate the overthrow of the United States."¹⁶⁵ Other unions disqualify from membership one who "associates himself with, or lends support to, any organization or group that expounds or promotes any

161. See *id.* at 450-55 (questioning Congressional authority to disqualify Communist Party members from positions affecting interstate commerce on the grounds that the members would likely use their position to incite political strikes).

162. 29 U.S.C. §§ 411-415 (1988).

163. 29 U.S.C. § 411(a)(2) (1988).

164. See Sautman, *supra* note 107 at 153 n. 10 (citing the United Auto Workers' Constitution which states in pertinent part:

No member of any Local Union shall be eligible to hold any elective or appointed position in this International Union or any local union in the International Union, if he is a member of or subservient to any political organization, such as the Communist, Fascist or Nazi Organization which owes its allegiance to any government other than the United States or Canada, directly or indirectly).

165. See *id.* at 152 n. 10 (citing International Brotherhood of Locomotive Engineers, § 27(a) at 34 (1976)).

doctrine or philosophy inimical to or subversive of the fundamental principles of [the United States]."¹⁶⁶ Furthermore, the by-laws of the retail clerks union reflect direct anti-communist sentiment: "[A]ny person who is a member or subscribes to, or supports the principles of a Communist or Fascist party or similar organization having its purpose to overthrow the government of the United States. . . shall not be eligible for membership."¹⁶⁷

These internal union regulations do not violate the United States Constitution. In *Hovan v. United Brotherhood of Carpenters and Joiners of America*,¹⁶⁸ the First Circuit found no state action in the union's rejection of an individual for membership based on his refusal to swear to an oath renouncing any "Revolutionary Organization."¹⁶⁹ The Court noted that to find state action would "constitutionalize" many of LMRDA's "Bill of Rights."¹⁷⁰ This would have overturned previous cases which had compared the constitutional and statutory 'Bills of Rights' within the labor union context. The court found certain statutory rights and determined that these rights were narrower than the constitutional rights.¹⁷¹ Consequently, legal regulations which prohibited individuals with communist connections from becoming union members or leaders,¹⁷² were permissible when implemented by private labor unions despite that similar regulations implemented by the government had been found unconstitutional.

By the 1970's there was some indication of a shift toward protecting individuals' rights to argue and advocate beliefs, including communist beliefs.¹⁷³ In *Turner v. Air Transport Lodge*,¹⁷⁴ the Second Circuit held

166. See *id.* (quoting the United Painters Union § 9(b) at 51 (1980)).

167. See *id.* (citing the Retail Clerk Union, § 5(k) at 3 (1977)).

168. 704 F.2d 641 (1st Cir. 1983).

169. *Id.* at 642. But see, *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956) (noting that federal law was triggered by an employer-union agreement and is thus factually different from union membership and internal union affairs). See also, Wellington, *The Constitution, the Labor Union, and "Governmental Action,"* 70 YALE L.J. 345 (1961) (elaborating on the issue of state action).

170. *Id.* at 643.

171. See, e.g., *United Steelworkers of America v. Sadlowski*, 457 U.S. 102 (1982) (illustrating how the Court construed 29 U.S.C. § 411(a)(2) (1976) more narrowly than the first amendment).

172. See, e.g., 29 U.S.C. § 504(a) (1988) (replacing 159 U.S.C. § 159(h)); see also, *United States v. Brown*, 381 U.S. 437 (1965) (holding LMRDA's section 504(a) unconstitutional where it restricted union personnel from being Communist Party members).

173. *Hurwitz v. Directors Guild of America, Inc.*, 364 F.2d 67, 75 (1st Cir. 1966) (holding that a union's anti-Communist oath unreasonable and vague and therefore an impermissible method of furthering the union's otherwise valid interest in protecting itself against Communist infiltration).

174. 590 F.2d 409 (2d Cir. 1978).

that the free speech guarantee found in LMRDA's bill of rights may not be infringed by expelling a member who advocated communist ideas.¹⁷⁵ The court held that the union's constitution, which prohibited "advocating or encouraging communism" was too broad to be a "reasonable means for preventing Communist party infiltration."¹⁷⁶ Therefore, the court struck down this union restriction as unreasonable and in direct violation of LMRDA's protection of free expression. Furthermore, the court indicated that even if the rule had been reasonable, there was "no evidence that anything Turner did or said caused any harm to the union or interfered in any way with its contractual obligations."¹⁷⁷

Most of these same courts, however, also distinguish between advocacy and membership. In *Turner*, for example, the court favorably cited earlier precedent:

We do not challenge the union's right to exclude or expel a person from membership if it is established that he has engaged in subversive activity or if it is established that he is a member of the Communist Party.¹⁷⁸

Since 1959, LMRDA had statutorily declared that mere membership in the Communist Party was grounds for rendering communist members ineligible for union positions. In 1965, however, this provision was declared unconstitutional in *United States v. Brown*,¹⁷⁹ although it is still permissible under labor unions' internal regulations.

c. Rights of International Contact

Contact between foreign and American trade unionists, made either in the United States or abroad, is the third area affecting the rights of American citizens. Beyond the issue of association between foreign and domestic trade unionists, the exclusion of non-resident aliens raises constitutional concerns of its own. In *Kleindienst v. Mandel*,¹⁸⁰ the Supreme Court recognized that the exclusion of foreigners could affect the first amendment rights of United States citizens. Nevertheless, the

175. *Id.* at 411.

176. *Id.* at 412.

177. *Id.* See 29 U.S.C. § 411(a)(2) (1989) (stating that the free speech mandate of the LMRDA does allow a union to adopt and enforce reasonable rules).

178. See *Turner*, 590 F.2d 409, 412 (citing *Hurwitz v. Directors Guild of America, Inc.* 364 F.2d 67, 76 (2d Cir.), *cert. denied*, 385 U.S. 971 (1966) and *Rosen v. District Council No. 9*, 198 F. Supp. 46 (S.D.N.Y. 1961)). Even *Turner's* concurring opinion, which found the union rule too "broad, vague and indefinite", would have permitted the rule to be used against a known serious threat such as an advocate of the Communist Party. *Id.* at 413-14.

179. 381 U.S. 437 (1965).

180. 408 U.S. 753 (1972).

Court found the immigration law,¹⁸¹ which prohibited entry into the United States of any alien advocating world communism doctrine, constitutional.¹⁸² Indeed, the Court commented that the exchange of ideas and information is at the core of the first amendment and that American audiences would be denied this exchange if the foreigner was excluded.¹⁸³ Notwithstanding these observations, the Court denied relief, citing Congress' plenary power over immigration and the Court's position that immigration legislation does not fall under the first amendment.¹⁸⁴

Further legal requirements and potential liabilities exist for both foreigners and Americans under the Foreign Agent Registration Act (FARA).¹⁸⁵ The problematic areas include exchange activities, if they involve proscribed dissemination of materials categorized as "political propaganda,"¹⁸⁶ and engagement in "lobbying" activities which might require registration.¹⁸⁷

American labor unionists hesitate to involve themselves with foreign communist trade unions because of passport restrictions issued by the United States. The restrictions are placed upon American citizens for national security and foreign policy reasons. In *Haig v. Agee*,¹⁸⁸ the Supreme Court held that the Secretary of State has the authority to revoke an American citizen's passport on the grounds that his activities

181. INA, *supra* note 40, at 8 U.S.C. § 1182(a)(28).

182. 408 U.S. 753 (1972).

183. *Id.* at 767.

184. *Id.* As to the Executive Power, the Court found the Attorney General had justified the harm to the first amendment by showing its denial of the exclusion waiver was for "facially legitimate and bona fide" reasons as required under the law. *Id.* at 765.

185. 22 U.S.C. §§ 611-621 (1988); see Note, *The Foreign Agents Registration Act: When Is Registration Required?* 34 S.C.L. REV. 687 (1983) (discussing the Foreign Agents Registration Act and focusing primarily on agents who act on behalf of foreign commercial enterprises or state enterprises of a highly commercial nature).

186. 22 U.S.C. § 611(j) (1988). Political propaganda is broadly defined as ". . .any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) . . .which the person disseminating the same believes will. . .induce, or in any way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) advocates, advises, instigates or promotes. . .disorder. . .or conflict. . ." 22 U.S.C. § 611(j) (1988).

187. See generally, Comment, *Heat Not Light: The Foreign Agents Registration Act After Meese v. Keene*, 11 FORDHAM INT'L L.J. 184 (1987) (arguing that the government's use of the term "political propaganda" amounts to a violation of the constitutional guarantee of free speech).

188. 453 U.S. 280 (1981).

may cause serious damage to national security.¹⁸⁹ Under the Passport Act,¹⁹⁰ the government has promulgated regulations authorizing passport revocation for a variety of reasons.¹⁹¹ These reasons include: national security; the prevention of government overthrow by subversion or espionage; and foreign policy if the travel involved conflicts with United States objectives abroad.¹⁹² The right to travel has nevertheless received some constitutional protection. In *Kent v. Dulles*,¹⁹³ the right to international travel was found to be an inherent "liberty" interest guaranteed by the fifth amendment's due process clause.¹⁹⁴

Constitutional protection of the right to travel is greatest where associational rights can be found. In 1961, the Court ruled in *Communist Party of the United States v. Subversive Activities Control Board*,¹⁹⁵ that the government's authority to deny passports, on the grounds that communism or furtherance of communist goals, is constitutional. In *Aptheker v. Secretary of State*,¹⁹⁶ however, the Court declared unconstitutional the portion of the Internal Security Act of 1950 which authorized restriction of Communist members' passports on the basis of mere party membership.¹⁹⁷

189. *Id.* at 299-301. This grant of authority to restrict travel was provided by Congress under § 211(a) of the Passport Act. 22 U.S.C. § 211(a) (1988). *See* *Aptheker v. Secretary of State*, 378 U.S. 500 (1964) (holding that restricting travel, on account of mere membership in the Communist Party, was unconstitutional although foreign policy and national security concerns might be viable reasons for travel restrictions).

190. 22 C.F.R. § 51.70(b)(4) (1980).

191. Note, *Passport Revocations or Denials on the Ground of National Security and Foreign Policy*, 49 FORDHAM L. REV. 1178, 1185 n. 40 (1981).

192. *Id.* at 1189 n. 75.

193. 357 U.S. 116, 125 (1958).

194. *But see*, *Zemel v. Rusk*, 381 U.S. 1 (1965); *Snepp v. United States*, 444 U.S. 507 (1980); *Haig v. Agee*, 453 U.S. 280 (1981) (finding foreign policy and national security concerns sufficiently compelling interests for travel restrictions).

195. 367 U.S. 1 (1961). The Court held that the statute does not attach registration requirements to the incident of speech but to the incidents of foreign domination. *Id.* at 90. While upholding section 7 of the Passport Act requiring registration, the *Communist Party* decision did not address the possible consequences of registration on the rights of individual Party members, particularly when they requested a passport or sought labor union employment. *Id.* at 70.

196. 378 U.S. 500 (1964).

197. *Id.* at 509-10. *See* *United States v. Brown*, 381 U.S. 437 (1965) (paralleling *Aptheker* where the Court found unconstitutional LMRDA's § 504(a) which disqualifies individuals for labor union office based on membership in the Communist Party).

2. Rights of Aliens

The law establishes a dichotomy between citizens or resident aliens,¹⁹⁸ with judicially cognizable rights, and non-resident aliens who do not possess a recognized right to enter the United States.¹⁹⁹ In *Kleindienst v. Mandel*,²⁰⁰ the Supreme Court upheld the government's exclusion of a Marxist theoretician who was invited to participate in an academic conference in the United States.²⁰¹ Because Mandel was a non-resident alien, he had no constitutional right of entry to this country²⁰² nor did his exclusion violate the rights of American citizens who were denied their rights of association and the opportunity to express their ideas.²⁰³ The Court deferred its authority to the executive branch provided the exclusions were based on "facially legitimate and bona fide" statutory grounds.²⁰⁴

Congress has recently removed ideological exclusions under the Immigration and Naturalization Act of 1990.²⁰⁵ Statutory authority still exists to permit the government to deny admission to aliens on grounds that entry will bring about illegal activities affecting national security or will have potentially serious adverse foreign policy consequences. Aliens who are trade union representatives from ideologically unacceptable totalitarian governments are no longer statutorily excluded.²⁰⁶

Facially, the Immigration Act of 1990, seems to move the United States toward compliance with its obligations, under the 1975 Helsinki Accords, to facilitate and foster greater international freedom of movement and exchange of ideas across borders.²⁰⁷ Consequently, nonresident aliens appear to have been statutorily granted the same rights against ideological discrimination that American citizens enjoy under the United States Constitution, unless the United States government

198. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Bridges v. California*, 314 U.S. 252 (1942) (recognizing that resident aliens have certain judicially cognizable interests under the Constitution such as equal protection).

199. *Kleindienst v. Mandel*, 408 U.S. 753 (1972).

200. *Id.*

201. *Id.* at 756.

202. *Id.* at 762.

203. *Id.* at 768-69. See Comment, *Immigration and the First Amendment*, 73 CALIF. L. REV. 1889, 1901-02 (1985) (discussing whether the exclusion of an alien is subject to first amendment objection).

204. *Id.* at 770.

205. Immigration Act of 1990, *supra* note 3.

206. See generally, CLASBY, *supra* note 66, at 1146 (discussing the law preceding Immigration Act of 1990).

207. See generally, Miranda, *supra* note 66 (examining the statutory framework and case law addressing the ideological exclusion of aliens from the United States in light of the Helsinki Accords).

does not too early find that the alien threatens a national security or non-ideological foreign policy interest.

Nevertheless, issues remain concerning the extent to which other existing anti-communist statutes may apply to a non-resident alien. If the alien, alone or in conjunction with an American labor union, engages in activities which disseminate information or seek to influence government policies, it is unclear whether he will need to comply with FARA's requirements, the remnants of the Alien Registration Act or the Internal Security Act. Moreover, there are unknown risks which the alien creates for his American labor union associate if the alien can be connected to communism either through his particular foreign trade union or formerly totalitarian government.

III. ASSESSING THE BARRIERS AND OPENING DOORS

A. INTERNATIONAL CONSIDERATIONS

In 1975, the United States became a signatory to the Helsinki Accords.²⁰⁸ With the McGovern Amendment²⁰⁹ in 1977, the United States government began relaxing its ideological exclusions under the Immigration Act of 1952²¹⁰ to achieve greater compliance with the Helsinki Accords. Senator McGovern said the amendment, which empowers the Attorney General to waive excludability under the Immigration Act of 1952,²¹¹ demonstrates the United States confidence in the free enterprise system and political democracy.²¹²

The McGovern Amendment, however, explicitly did not provide a waiver for aliens where security interests existed or, for representatives of labor organizations who were considered agents of a totalitarian

208. *See Conference on Security and Co-operation in Europe: Final Act (Aug. 1, 1975)*, 14 I.L.M. 1292 (1975) [hereinafter HELSINKI ACCORDS] (providing in pertinent part:

The participating States intend to facilitate wider travel by their citizens for personal or professional reasons and to this end they intend in particular:

—gradually to simplify and to administer flexibly the procedures for exit and entry;

—to ease regulations concerning movement of citizens from the other participating States in their territory, with due regard to security requirements).

Other signatories included, among others, the Soviet Union, Czechoslovakia, the German Democratic Republic, Hungary and the United Kingdom. *Id.*

209. 22 U.S.C. § 2691 (1988).

210. INA, *supra* note 40, at 8 U.S.C. §§ 1101, 1182(a)(28).

211. The law also authorized the Government to refuse waivers to persons coming from countries that were not in substantial compliance with the Accords. 22 U.S.C. § 2691(d) (1988).

212. *See* 125 CONG. REC. 10,564 (daily ed. May 10, 1979) (statements of Sen. McGovern) (testifying that the United States is confident of its institutions and thus not afraid to admit visitors with different ideological backgrounds).

state.²¹³ Critics of the United States' continued restriction of foreigners based on their ideology, proclaimed it an international embarrassment that the United States, known for its freedoms, was the only Western democracy that used political tests for the issuance of visas.²¹⁴ Indeed, certain communist states, such as the Peoples Republic of China, who are not signatories to the Helsinki Accords, do not exclude foreigners solely for their ideologies.²¹⁵ While the Helsinki Accords do not have the force of a treaty, thus creating only a moral duty, Congress ratified it and further established a joint executive-congressional commission²¹⁶ to promote the objectives of the Accords.²¹⁷

The Helsinki Accords provide that participating states act in consonance with the United Nations Charter, the Universal Declaration of Human Rights and similar international agreements.²¹⁸ As a signatory of the Helsinki Accords and supporter of the United Nations Covenant on Economic, Social and Cultural Rights,²¹⁹ the United States faces an interesting dilemma. Can the United States meet its obligations under the Helsinki Accords by discontinuing its explicit exclusion of aliens on grounds of membership in a labor organization under a totalitarian

213. 22 U.S.C. § 2691(a),(b)(1988).

214. *Exclusion and Deportation of Aliens: Hearings Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 128 (1987) (statement of Stenny H. Hoyer, Chairman of the Helsinki Commission, indicating that ideological exclusions are a national embarrassment and unjustifiable). See Miranda, *supra* note 66, at 319 n.115 (referring to the Stoyer comment).

215. Kraus and Wang, *A Comparative Study of the Legal Rights and Duties of Lawful Aliens in the United States and the Peoples Republic of China*, 25 SAN DIEGO L. REV. 327, 346 n.124 (1988) (citing DETAILED RULES FOR IMPLEMENTATION OF THE LAW OF THE PRC FOR CONTROL OF FOREIGN NATIONALS ENTERING AND LEAVING THE COUNTRY, art. 7 (1986)).

216. 22 U.S.C. §§ 3003-3009 (1988).

217. 22 U.S.C. § 3002 (1988). See Leich, *Contemporary Practice of the United States Relating to International Law*, 83 AM. J. OF INT'L L. 905, 906 (1989) (describing the United States' Visa Waiver Pilot Program for Japan and the United Kingdom and reporting that additional countries are being added).

218. HELSINKI ACCORDS, *supra* note 208, at 1295 (quoting 1(a)VII:

[I]n the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfill their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound).

219. G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966). See Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*, art. 19, 21, U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6546 (1966) (guaranteeing freedom of opinion and expression without political interference and the freedom to receive and impart information and ideas through any media regardless of frontiers).

government or for the aliens' beliefs, statements, or associations?²²⁰ Conflicts will arise where the ideology of the alien's government remains technically unagreeable, but it permits pluralism in unions.²²¹ Problems will also arise where the alien's government is non-totalitarian and permits pluralism in unions, but at the same time allows the continuation of unions with remnants of formerly communist bonds.

B. INGRESS BARRIERS TO FOREIGN LABOR UNION REPRESENTATIVES

Non-resident aliens have no direct United States constitutional rights regarding entry and deportation.²²² Those rights which non-resident aliens do possess are statutorily-based. In response to Cold War anti-communist legislative activity, the Supreme Court determined that American citizens have a constitutional right to believe in, advocate, or belong to the Communist party without governmental interference, provided they do not engage in illegal activities. The Immigration Act of 1990,²²³ which codifies two decades of Supreme Court decisions,²²⁴ gives non-resident aliens a similar right to believe in, advocate or belong to the Communist Party. For example, a Polish citizen seeking entry to the United States, under a non-immigrant visa, would not be excluded simply because of his ideology. Similarly, that he was a supporter, active advocate or member of his government's ruling political party, would not disqualify his entry into the United States.

More problematic, however, is the situation where this hypothetical alien actively advocated, aided, or supported policies which sought to quash Solidarity's illegal activities under then existing law. The Immigration Act of 1990 underscores this point because it permits exclusion for security reasons where an alien seeking to enter the United States demonstrates that he is likely to engage in illegal activities *in the United States*.²²⁵ Nevertheless, despite no statutory exclusion, non-im-

220. See Immigration Act of 1990, *supra* note 3 and accompanying text (discontinuing the explicit labor organization exclusion). While the new immigration law continues protection against discrimination based on beliefs, the United States Constitution does not protect against improper activities. *Id.*

221. See generally, Wolff, *Poland's Trade Union Statute: An Impermissible Violation of International Human Rights Law*, 10 BROOKLYN J. OF INT'L L. 25 (1984) (discussing whether Poland, a communist state, can realistically permit pluralism in unionization).

222. See *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (ruling that a non-resident alien holding communist beliefs has no constitutional right of entry to the United States).

223. Immigration Act of 1990, *supra* note 3.

224. See *supra* notes 198-207 and accompanying text (tracing judicial decisions regarding entry and deportation rights of non-immigrant aliens).

225. Immigration Act of 1990, *supra* note 3, at 8 U.S.C. § 1182(3).

migrant aliens must face the fact that historically there is a broad power of the government to regulate national security and foreign policy. For example, the government can control the passports of United States citizens where travel is found by the government to implicate national security or American foreign policy interests.²²⁶

Indeed, the Immigration Act of 1990 fails to provide standards by which past activities will be considered relevant to a non-resident alien's entry into the United States. Moreover, the Immigration Act of 1990 leaves unclear whether an alien's activities will mandate exclusion from the United States on ideological, national security or foreign policy grounds.

Ideology, as a ground for excluding aliens, has been largely removed from immigration law restrictions. The Immigration Act of 1990, however, explicitly states that aliens can still be denied admission based on national security or foreign policy concerns which do not compromise constitutional protection.²²⁷ This provision appears to give the government extremely broad discretion to exclude foreign nationals, given the judiciary's deference to the executive's authority in national security and foreign policy matters.

The conferees of the Immigration Act of 1990 legislation, however, attempted to limit the power of the executive to exclude aliens in several ways. First, the law requires that exclusions be based on grounds of "potentially serious adverse foreign policy consequences for the United States."²²⁸ Furthermore, as a matter of policy,

[t]he conferees believe that granting an alien admission to the United States is not a sign of approval or agreement and the conferees therefore expect that, with the enactment of this provision, aliens will be excluded not merely because of the potential signal that might be sent because of their admission, but when there would be a clear negative foreign policy impact associated with their admission.²²⁹

Second, the conferee's intended that the executive individualize the assessment of an alien's application. The conferees emphasized that

226. See *Kent v. Dulles*, 357 U.S. 116, 129-30 (1957) (holding that although there is a right to travel internationally, under the fifth amendment's liberty interest, the government can override it by showing compelling interests, such as foreign policy or national security, and regulations narrowly tailored to achieve those interests).

227. Immigration Act of 1990, *supra* note 3, at § 1182(a)(3)(A)-(a)(3)(C).

228. Immigration Act of 1990, *supra* note 3, at § 1182(a)(3)(C)(i). See Conference Report 1990, *supra* note 86. The conferees explained that aliens previously "excludable under Section 212(a)(28) because of membership or affiliation with the Communist party, but who are no longer excludable for that reason because of the changes made in this provision, would not be excludable under the new foreign policy grounds established by this legislation merely because of such membership or affiliation." *Id.*

229. Conference Report 1990, *supra* note 86, at 128-29.

"an alien could be excluded only if the Secretary of State has reasonable ground to believe an alien's entry or proposed activities within the United States would have potentially serious adverse foreign policy consequences."²³⁰

Finally, the statute's requirement that the Secretary of State personally inform the relevant congressional committees, when a determination of excludability is made under this provision, further emphasizes the conferees' intent that the provision be used only in unusual circumstances.²³¹ These circumstances, as envisioned by the conferees, might be where an alien's entry could result in imminent harm to the lives or property of American citizens, or to property both here and abroad, or where entry would violate a treaty or international agreement.²³² Moreover, even if the foreign labor representative were admitted under a temporary visa, a further line of barriers may await him under a variety of anti-communist laws. If he disseminates literature or ideas or enters into cooperative arrangements seeking to influence American government policies, he may have to comply with the FARA's²³³ requirements and similar anti-communist regulations.

Although the thrust of the new Immigration Act of 1990 is to open doors to aliens, regardless of ideology, concern exists that the law permits the exclusion of aliens due to their participation in 'unprotected activities' based on national security or foreign policy concerns. Until the United States applies the law in a manner which individualizes consideration of the alien applicants and prohibits decisions based on stereotyped activities of communist organizations, the continued danger of Cold War era exclusions remain and the Helsinki Accords will not be fully implemented.

230. *Id.* at 129. See Immigration Act of 1990, *supra* note 3, at § 1182(a)(3)(C)(i) (giving two exceptions for the foreign policy exclusion). First, officials or candidates of a foreign government cannot be excluded because of past, current, or expected beliefs, statements or associations, if lawful within the United States. *Id.* The second exception protects aliens from discrimination based on beliefs, statements, or associations unless the "Secretary of State personally determines that the alien's admission would compromise a compelling United States foreign policy interest." *Id.* Conference Report 1990, *supra* note 86, at 129. The conferees state that the second provision was intended to be used sparingly and that the limitation is a substantially higher standard which must link the alien's exclusion to a compelling foreign policy interest. *Id.*

231. *Id.* See Immigration Act of 1990, *supra* note 3, at § 1182(a)(3)(C)(iv) (requiring the Secretary of State to "notify on a timely basis the chairmen of the Committees on the Judiciary and Foreign Affairs of the House of Representatives and of the Committees on the Judiciary and Foreign Relations of the Senate of the identities of the alien and the reasons for the determination").

232. Conference Report 1990, *supra* note 86, at 130.

233. 22 U.S.C. §§ 611-621 (1988).

C. EGRESS BARRIERS AND RISKS TO AMERICAN LABOR
REPRESENTATIVES IN CONTACT WITH COMMUNIST IDEOLOGY

In the wake of the Cold War, many formerly communist individuals and institutions are struggling under recent political and economic reforms. This struggle calls upon unions to change their roles in order to help make the new reforms work. Despite their communist past, these unions look to the world, especially to the West, for guidance and assistance. American labor representatives, seeking to assist Eastern European unions, must determine whether United States regulations pose legal or practical barriers to contact between Eastern and Western unions. Most likely, the United States will not prevent visits to Eastern European countries not previously restricted.²³⁴ Cooperative activities between domestic and East European labor unions must stay within the bounds of constitutionally-protected activities so as to remain legal.²³⁵

American labor representatives involved with communist ideology and activities face some legal pitfalls. The greatest immediate risk to the labor union member comes from the union's internal regulations which penalize association with communist ideology and activities.²³⁶ Union constitutions and by-law regulations, originating from the Cold War era, severely restrict a member's contact or association by threatening expulsion from the union.²³⁷

Statutory rights granted to union members to protect their freedom of speech and association are balanced by the union's right to impose reasonable rules.²³⁸ Courts have upheld the power of unions to exclude from affiliation and membership, unions and individuals who believe in, support, or are associated with communist organizations.²³⁹ The courts also point out that labor unions are private organizations and therefore their internal regulations do not raise constitutional issues.²⁴⁰

Other statutory issues that could cause concern, for American unions or members, are possible violations of American Cold War anti-com-

234. See *Zemel v. Rusk*, 381 U.S. 1, 7-11 (1965) (citing history of governmental restrictions on travel to particular countries).

235. See *supra* notes 146-161 and accompanying text (tracing the distinction between constitutionally protected ideologies versus constitutionally unprotected activities).

236. *Id.*

237. See Sautman, *supra* note 107, at 150-55 (listing extensive union restrictions on entrance of communists or other subversive groups).

238. 29 U.S.C. § 411(a)(2) (1988).

239. See Sautman, *supra* note 107, at 161-67 (discussing legal history of exclusion of communists from unions).

240. *Hovan v. United Bhd. of Carpenters and Joiners of Am.*, 704 F.2d 641, 641-45 (1st Cir. 1983).

munist laws; especially while the foreign labor unionist visits the United States. These statutory issues inhibit American labor union participation in international labor cooperation efforts in formerly communist nations striving towards political and economic reform.

CONCLUSION

As United States lawmakers begin amending Cold War legislation, they should develop a consistent policy which considers the recent changes in the Soviet Union and Eastern Europe, and realistically gauges the international threat of communism. Currently, the United States grants substantial economic aid to Eastern European countries and has even granted most favored nation status to some of these countries. Moreover, the United States seeks to train new Eastern European societies in management techniques so they can thrive under market economies. Therefore, the United States should give these countries direct access to American labor unions and the latest techniques in labor-management.

In addition, the United States must fulfill its objectives under both the Helsinki Accords and the United Nations covenants. International travel and exchanges should be accessible to both American labor unionists and non-resident aliens. The McGovern Amendment, the Moynihan Amendment and the Immigration Act of 1990 have all sought to decrease exclusion of non-resident aliens based on ideological grounds. Nevertheless, such legislation is still susceptible to Cold War interpretations. Certainly the United States, with its reputation as a place of ideas and open society, would strengthen itself and its reputation by lowering unnecessary walls to Cold War anti-communism.

America's national interests are already protected by laws other than the anti-communist laws. The immigration laws specifically provide that foreigners who threaten national security or foreign policy goals may be excluded or deported. American constitutional law, while protecting belief, association, and advocacy, does not protect illegal conduct. American citizens cannot engage in illegal activities and foreigners have no greater rights.

American labor unions must also re-evaluate the anti-communist undertones found in their constitutions and by-law provisions. Unions are likely to benefit from re-examination of their domestic and international policies which exclude or penalize members for their association with certain types of unacceptable organizations. This must be done at the highest councils of the AFL-CIO and national unions, as they are

the institutions which normally demand certain anti-communist standards of their affiliated local unions.

Will Eastern European nations even be interested in taking the advice of labor representatives from a country that arguably could prohibit them, as undesirable aliens, from visiting the United States to learn more about non-communist approaches to labor reforms? The Immigration Act of 1990 begins to open the door to the post-Cold War realities.